No. 80-2131

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee,

CITY OF SALINAS,
Real Party in Interest.

On Appeal From the Supreme Court of the State of California

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Southern Pacific Transportation Company presses the instant appeal after having failed to impress the California Supreme Court with the merits of its Petition for Writ of Review and Petition for Rehearing. In this appeal two main questions are presented. The first question consists of two parts: Did the action of the California Public Utilities Commission (hereinafter the Commission) in granting the City of Salinas a right of entry upon the property of Southern Pacific Transportation Company violate the constraints of Section 1 of the Fourteenth Amendment of the Constitution of the United States? Concurrently, did the California Supreme Court do so when it summarily denied Southern Pacific Transportation Company's petition for review? The second question is whether the decision of the California Supreme Court in *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891 (1979), with respect to the effect of a denial, without opinion, of a petition for writ of review, passes constitutional muster? This question was raised by Southern Pacific Transportation Company in its previous appeal to this Court (No. 80-932). That appeal was dismissed on February 23, 1981, for want of a substantial federal question.

The City of Salinas, the real party in interest, hereby challenges Southern Pacific Transportation Company's assertion of jurisdiction for the reasons herein given.

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STATE OF CALIFORNIA,
Appellee,

CITY OF SALINAS,
Real Party in Interest.

On Appeal From the Supreme Court of the State of California

MOTION TO DISMISS OR AFFIRM

The real party in interest (hereinafter, the City) moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of the State of California, on the grounds that the judgment is based upon adequate state grounds and that the appeal does not present a substantial federal question.

I

OPINIONS BELOW

The opinions below are correctly stated in Appellant's (hereinafter, Southern Pacific) appendices to its Jurisdictional Statement.[1]

II

JURISDICTION

Jurisdiction is asserted by Southern Pacific under Title 28, United States Code § 1257(2). (Jur. St. 6.)

III

ARGUMENT

A. The Decisions Below Rest Upon Adequate State Grounds

The rights which Southern Pacific claims were impinged and the procedures which it asserts were circumvented in the Commission's decisions challenged in this appeal, are creatures of state law set forth in the California Public Utilities Code. It is this body of law that gives substance to and defines the rights and obligations of the parties. In this regard, it is particularly poignant and meaningful to observe that the interpretation, application, and operation of the Public Utilities Code is the exclusive responsibility of the California Supreme Court and the Commission. This is beyond dispute. *Speiser v. Randall*, 357 U.S. 513, 523 n.7

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[1]References herein to Jurisdictional Statement or to appendices thereof, are to Appellant's Jurisdictional Statement or the appendices thereof. "Jur. St." followed by a number or "Jur. St. Appx." followed by a letter and number, refer to pages of the text or appendix on the Appellant's Jurisdiction Statement.

(1957); rehearing denied, 358 U.S. 860 (1958); *Quong Ham Wah Co. v. Industrial Accident Commission*, 255 U.S. 445, 448 (1921); *Greyhound Lines, Inc. v. Public Utilities Commission*, 68 Cal.2d 406 (1968). In addition, it is noteworthy that it has been long recognized that denial of a petition for writ of review is tantamount to a decision of the court that the orders and decisions of the Commission do not exceed its authority or violate any rights of the parties under federal or state Constitutions. Even though the petition be denied without opinion, the denial is nonetheless a decision on the merits and, therefore, a final judicial determination which affirms the decisions and proceedings of the Commission. *People v. Western Airlines, Inc.*, 42 Cal.2d 621, 630-631 (1954); *Southern Pac. Co. v. Van Hoosear*, 72 F.2d 903; *Consolidated Freightways, Inc. v. Railroad Com.*, 36 F. Supp. 269, 270 (1951).

B. The Issue Of The Right Of Entry Is Moot

The Jurisdictional Statement of Southern Pacific is distinguished by what it fails to state. It fails to apprise this Court of the fact that on May 21, 1980, the City (as an added precaution and in recognition of the tenacity of Southern Pacific) obtained an Order of Immediate Possession of an easement over and across the subject property from the Superior Court of the State of California in and for the County of Monterey, Action No. 76108;[2] and that on June 10, 1981, the City and Southern Pacific entered into a Stipulation for Judgment and Order thereon in said action for a final judgment of condemnation of an easement over and across the subject property, to be utilized in effecting the

[2]See Appendix "A" attached hereto.

construction of the Davis Road Grade Separation project.[3] A final Judgment of Condemnation was entered in the action on June 17, 1981.[4]

The issues raised by Southern Pacific with respect to the right of entry ordered by the Commission are moot, and the injury alleged is without substance. Assuming, arguendo, that Southern Pacific's rights to due process were somehow violated by the Commission, they were redressed in the Superior Court action. In that action, Southern Pacific was afforded an opportunity for hearing but declined it, preferring to accept a stipulated judgment and $100.00 as a substitute.

C. The Denial Of Southern Pacific's Petition For Writ Of Review By The California Supreme Court Does Not Raise Any Federal Question

Reduced to their basic element, Southern Pacific's contentions center upon the refusal of the California Supreme Court to hear its appeal below. Southern Pacific contends that this refusal impinged upon its due process rights secured by Section One of the Fourteenth Amendment of the United States Constitution. This same theory was advanced in its previous appeal to this Court. That such a contention raises only a frivolous federal question and should accordingly be dismissed is as patently discernible in this appeal as in the previous one.

In its prior appeal, Southern Pacific conceded that the California Supreme Court need not grant review in every

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[3]See Appendix "B" attached hereto.

[4]See Appendix "C" attached hereto.

case emanating from the orders of the Commission. (See Southern Pacific's Jurisdictional Statement Pages 28-29, filed in its previous appeal.) However, in this appeal, as before, Southern Pacific argues that the state court must grant review because the action of the Commission "so clearly constitutes a denial of both substantive and procedural due process";[5] and that its failure to do so "was necessarily an arbitrary action" and "denial of federal due process".[6]

It is obvious that Southern Pacific disagrees with the California Supreme Court as to the merit of the petition presented below. However, once again Southern Pacific fails to digest the clear meaning of the message of the minute order set forth in Appendices A and B of its Jurisdictional Statement, viz., that its petition failed to set forth sufficient grounds for the granting of review. Implicit in that message is the finding that the Commission's challenged orders were in compliance with apposite state statutes and regulatory law. *Western Airlines,* supra; *Consumers Lobby,* supra. Having been frustrated below, Southern Pacific again appears before this Court. Its cause is no more just and its arguments are no more compelling than they were below and in its previous appeal. The mere fact that Southern Pacific has a view of its cause that is not shared by the California Supreme Court hardly attests to a deprivation of constitutional rights or the caprice of the California Supreme Court, whose decision adversely affected it. See *Napa Valley Electric Co. v. Railroad Commission,* 6 Cal.2d 737 (1936).

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[5]Jur. St. 26-27.

[6]Jur. St. 27.

D. The Issue Of The Adequacy Of Review Of Decisions Of The Commission Under Statutory Law As Interpreted By The California Supreme Court Was Determined In The Prior Appeal

At pages 4 and 5 of its Jurisdictional Statement, footnote 7, Southern Pacific concedes that the question of the adequacy of review of Commission decisions under California law is "once again a question being raised." Southern Pacific then continues by declaring that "in this instance" the "arbitrary nature and the general unavailability of review of decisions of the California Public Utilities Commission is much more clearly demonstrated to be a substantial Federal question than it was in the previous appeal". The only reason advanced by Southern Pacific for this proposition is that the instant appeal challenges the denial of review of a Commission order allowing the City a right of entry on its property, whereas the former appeal challenged the denial of review of a Commission order which only apportioned costs of the project. It is difficult to understand this proposition in the mold cast by Southern Pacific, for it fails to demonstrate how the arbitrariness and general unavailability of review is accentuated by the nature of the order as to which review is refused. Certainly, an impingement of constitutional rights is not heightened or lessened because the order involved is one that is purported to unlawfully take money as opposed to real property.

In any event Southern Pacific, as noted, raised the issue of the adequacy of review under California law in its previous appeal. This Court dismissed that appeal for want of a substantial Federal question. That decision is a

decision on the merits as to this issue and has the conclusive effect of res judicata in this proceeding. See *Sunshine A. Coal Co. v. Adkins*, 310 U.S. 381, 60 S. Ct. 907, 84 L.Ed. 1263; *Napa Valley Electric Co. v. R. R. Comm.* (1920) 251 U.S. 366, 371-373, 64 L.Ed. 310, 313, 40 S. Ct. 174; *Southern Calif. Edison Co. v. Railroad Commission*, 6 Cal.2d 737, 50 P.2d 808; *Western Airlines*, supra, at pages 629-630; *Consumers Lobby*, supra, at pages 899-901.

Fundamentally, Southern Pacific's interpretation of the impact of the *Consumers Lobby* case represents a misunderstanding of the holding. This decision did not alter the nature of the review process as interpreted and applied by the California Supreme Court. In its opinion, the California Supreme Court noted (p. 899) that it was addressing a contention that is often presented on petitions for writ of review but nevertheless "misapplies the authority on which it relies and ignores the realities" of its "rulings on such petitions." The Court then went on to note that in reliance on the fact that the *Western Airlines* case declared that a denial of a petition for review is a decision on the merits as to the law and facts presented in the review proceedings, even though the order is without opinion, litigants often assert the applicability of the doctrine of stare decisis. The Court then noted (at p. 900) that "this reliance is misplaced. *Western Airlines* is not a stare decisis case but a res judicata case."

Southern Pacific asserts that it has difficulty understanding why a decision cannot be cited under the doctrine of stare decisis if a denial of a writ of review without opinion is, in fact, a decision on the merits both as to the law and

the facts presented.[7] Clarity may be gained by a careful reading of the Court's opinion. The doctrine of stare decisis applies only to judicial precedents, i.e., the ratio decidendi or actual ground of decision of a case cited as authority; and a case is not authority for a point not actually decided (p. 902). In short, continued the Court (p. 905),

> "although a summary denial by this Court of a petition for writ of review is a decision on the merits' for res judicata purposes (Western Airlines), it is not stare decisis. As we have seen, the merits of the decision may well be procedural rather than substantive; *yet because there is no opinion,* its ratio decidendi does not appear on its face. It would therefore be *sheer speculation* for litigants to rely on such decisions as precedents. In addition, such reliance may well prove a trap for the unwary: members of the public who have potentially meritorious petitions for review to present to this court may be dissuaded from doing so by the mere fact that we declined to take an earlier case *allegedly* raising the same question." (Emphasis added.)

Consumers Lobby is consistent with applicable principles of judicial review, and with common sense as well.

E. The Right To Enter Southern Pacific's Property For Construction Purposes Is Inherent In The Above Order Authorizing Construction

At the core of Southern Pacific's discontent in this appeal lies the fact that the Commission issued Decision No. 91891 which clarifies the meaning of its original order in Decision No. 91469. The Commission declared that the right to enter

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[7]Jur. St. 27.

Southern Pacific's right of way for purposes of constructing the Davis Road Overhead was inherent in the original order issued authorizing construction of the project.[8] This clarification was done at the City's behest and was necessitated by the fact that Southern Pacific raised objection with the California Department of Transportation over funding of the project on the ground that the City did not have authority to enter its right of way for construction purposes since Southern Pacific had not and would not grant a right of entry, and the Commission's Decision No. 91469 did not authorize entry.

1. Southern Pacific's Contentions Regarding The Inapplicability Of Section 1204 Are Incorrect

Section 1204 of the Code[9] must be read in light of the evident legislative intent set forth in Chapter 6, Part 1, Division 1 of the Public Utilities Code (Sections 1201 to 1220). To begin with, the Constitution of the State of California provides in Article 12, Section 5, that:

> "The legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article to confer additional authority and jurisdiction upon the commission to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain."

Pursuant to the plenary power granted the Legislature by the authority of this provision and its predecessor, the Legislature has enacted Sections 1201 et seq. of the Public

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[8] Jur. St. Appx. D-2.

[9] Hereinafter, all references to "Code" are to the California Public Utilities Code unless otherwise provided.

Utilities Code and conferred upon the Commission the authority, powers, duties and obligations therein set forth regarding the regulation of railroad crossings.

Pursuant to Section 1201 no pertinent construction at a railroad crossing may take place without the permission of the Commission first had and obtained. The Commission may refuse its permission or grant it upon such terms and conditions as it prescribes. Section 1202 provides that the Commission has the *exclusive power* to determine and prescribe the manner, including the *particular point of crossing,* and the *terms* of *installation,* operation, maintenance, use, and protection of each crossing of a railroad by a street; to alter, relocate or abolish any crossing; and to *require* a separation of grades, *prescribe the terms* upon which a separation of grades shall be made, and apportion expenses between the affected railroad and public agency.

Section 1204 provides, in full:

> "If the legislative body of the political subdivision determines that special benefits will accrue from the separation of grades to one or more districts within the political subdivision, and has made a finding to that effect and that the cost thereof, other than the portion to be paid by the railroad, interurban railroad, or street railroad involved, should be paid by such district or partly by the district and partly by the political subdivision, the commission may provide that such proportion of the total cost of the separation of grades, including the acquisition of property and the damage to property or an interest therein, as is not payable by the owners of the railroad, interurban railroad, or street railroad involved, may be assessed upon the district or that a part thereof may be paid

> by the district and a part by the political subdivision in accordance with the finding of the legislative body of the latter. The commission may provide that the physical work of making the grade separation as well as the proceedings for letting contracts therefor, collecting and enforcing the assessments, and making payment for damages and for the acquisition of property shall be done through the agency of the political subdivision in accordance with law. The order of the commission shall authorize the officers of the political subdivision to enter upon so much of the right of way of the railroad, interurban railroad, or street railroad as is necessary to effect the physical grade separation."

Sections 1206 to 1218, inclusive, are the so-called condemnation sections and set forth the procedures and authority of the Commission with regard to fixing just compensation and issuing final condemnation orders. Section 1207 provides in its introductory paragraph, in part:

> "Proceedings under Section 1206 may be commenced by order on the Commission's own motion or by a petition filed by the State . . . City . . . or . . . railroad corporation affected. Any such proceeding *may* be made a part of any proceeding commenced under Sections 1202-1205, inclusive. . . ." (Emphasis added.)

The statutory scheme, as indicated in this introductory paragraph, contemplates that proceedings under Section 1206 et seq. relating to fixing compensation and issuing final condemnation orders, may but need not be made a part of proceedings under Section 1202-1205, inclusive, relating to authorizing construction, approving the location

of the project and determining the terms pertinent thereto. These latter sections, of course, include the last sentence of Section 1204 authorizing and requiring the Commission to grant the City a right of entry.

Sections 1219 and 1220, respectively, declare Sections 1201-1205, inclusive, and Sections 1206-1218, inclusive, to be germane and cognate parts of and aids to the jurisdiction vested in the Commission for the supervision, regulation, and control of railroads. It is interesting to note that it is only in Section 1202, generally, and in Section 1204, specifically, that any reference is made to a right of entry: This subject is not referenced generally or specifically or, for that matter, even remotely, in Sections 1206-1218, inclusive.

It is against the light gleaned from this statutory background that the legislative intent in the last sentence of Section 1204 must be read. In this light, it is evident that Southern Pacific's contention that Section 1204 is inapplicable in the present case because of the "condition" limitation found in the first sentence of that section, is clearly and patently erroneous. Section 1204, in reality, deals with three subjects: 1) Assessments against districts for special benefits; 2) Provisions for doing of work; and 3) Authority of officers to enter right-of-way. Southern Pacific argues that Section 1204 is limited in its application by the *condition* that the political subdivision must first make a finding regarding assessment of costs against a benefited district and request confirmation thereof by the Commission. This condition, however, is of limited application itself, and only applies to the first subject dealt with by

Section 1204. It does not apply to the third subject to which Section 1204 speaks.

The broad powers conferred upon the Commission by the Legislature in Sections 1201 and 1202 can be exercised by the Commission without being limited by the necessity of a political subdivision first making a finding of special benefits, as contemplated in the context of the first sentence of Section 1204. To conclude, simultaneously, that the Commission is without authority to permit entry onto a railroad's right of way unless and until a political subdivision first makes a finding of special benefits to one or more districts within the political subdivision, for the unrelated purpose of assessing costs of the project, is absurd. The manifest purpose of the last sentence of Section 1204 is to enable the Commission to provide a means for implementing and effectuating projects it approves. Extension of the "condition" limitation in the first sentence of Section 1204, to delimit the authority of the Commission in the last sentence thereof, substantially impairs the jurisdiction, authority and ability of the Commission to provide for implementation of projects it approves. To accept Southern Pacific's view of things would be to implicitly accept the proposition that every order to construct issued by the Commission pursuant to Section 1202 would, at one and the same time, tell an applicant that it can construct its grade separation project on, over and/or across the right of way of the affected railroad, but that it can not enter the railroad's right of way to construct the project. This would constitute the epitome of the "good news-bad news" paradox.

Where language is fairly susceptible of two constructions, one of which will render it reasonable, fair and harmonious with its manifest purpose, and the other of which will be productive of absurd consequences, the first will be adopted. *County of Orange v. Heim* (1973) 106 Cal.Rptr. 825, 841, 30 C.A.3d 694; *Anaheim Union Water Co. v. Franchise Tax Board* (1972) 102 Cal.Rptr. 692, 698, 26 C.A.3d 95; *Lampley v. Alvares* (1975) 123 Cal.Rptr. 181, 184, 50 C.A.3d 124.

There is a strong presumption of the validity of decisions of the Commission, and its interpretation of the Public Utilities Code will not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language. *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 67 Cal.Rptr. 97, 68 C.2d 406. The Commission made an appropriate decision in issuing Decision No. 91891 and its reliance on Section 1204 was not erroneous, but proper.

2. Southern Pacific's Analogy to Section 1202.1 Is Incomprehensible

Southern Pacific contends that support for its belief that Section 1204 is inapplicable can be gleaned from the provisions of Section 1202.1. This is incomprehensible in view of the fact that Southern Pacific concedes that Section 1202.1 is inapplicable. It is vacuous and circuitous for one to argue the inapplicability of one section by analogy to another section which is admittedly inapplicable.

Section 1202.1 deals with a temporary order of the Commission designed to meet the immediate exigencies of an applicant whose needs and resources require and allow it to

proceed with project construction forthwith. It attempts to deal with the situation of the applicant who is confronted by a recalcitrant railroad that refuses to permit entry onto its right of way for construction purposes. This whole section relates to an emergency situation in which time is of the essence. The Legislature provided an efficient, expeditious and alternative means of handling the situation by providing that an applicant *may* proceed to Superior Court to obtain an order of immediate possession if it has already instituted a condemnation action in court (or upon the filing of such an action). Obviously, since the permissive "may" is used it defies logic for Southern Pacific to assert that Section 1202.1 "requires" an applicant to obtain an order of immediate possession in a "condemnation" action if it is to gain entry onto the railroad's right of way in the contemplated situation.

As the Commission declared in Decision No. 92299 (which amended Decision No. 91891), Conclusion of Law No. 2, Section 1202.1 is not applicable to a situation in which the Commission has issued a final order authorizing construction.[10]

It is noteworthy that once one traverses the maze of rhetoric and redundancy in which Southern Pacific casts its arguments, it is apparent that it has not advanced any contention that the Commission does not have the power to issue a right of entry. Rather, Southern Pacific, by analogy to Section 1202.1, maintains that the Commission could not grant the City a right of entry without a condemnation action having been instituted, since such an ac-

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[10]Jur. St. Appx. E-2.

tion is a predicate to issuance of an order of immediate possession in Superior Court.

While the institution of an eminent domain action is a required prerequisite to issuance of an order of immediate possession in Superior Court, this has nothing to do with the authority of the Commission to issue a right of entry. Eminent domain actions in Superior Court are governed by the provisions of Part 3, Title 7 of the California Code of Civil Procedure (Sections 1230 et seq.). However, as provided in Section 1230.060 of the Code of Civil Procedure.

> "Nothing in this title affects any other statute granting jurisdiction over *any* issue in eminent domain proceedings to the Public Utilities Commission." (Emphasis added.)

Southern Pacific ignores the fact that the Commission is not governed by the Code of Civil Procedure in condemnation actions. It is governed by the provisions of the Public Utilities Code.

Southern Pacific ignores the fact that the provisions of Sections 1201-1205, inclusive, relate to proceedings that need not be combined with and are not dependent on the so-called "condemnation" provisions of the Code set forth in Sections 1206-1218, inclusive.

Southern Pacific ignores the fact that Section 1202.1 is a "stop-gap" measure designed to provide alternative means of temporary relief in an urgent situation. In this regard, if a railroad refuses to allow an applicant entry upon its right of way for construction purposes, the applicant has alternative courses of action that may be fol-

lowed. The applicant may request the Commission to force the railroad under threat of contempt proceedings, to allow entry. (See Section 2113). However, since the Commission meets once every two weeks, and since the Commission is not, strictly speaking, a court with court machinery, but must itself prevail upon the courts for enforcement of its orders if all else fails (Section 2102; *Motor Transit Co. v. Railroad Commission of California* (1922) 209 P. 586, 590, 189 C. 573), this alternative might not prove expeditious or efficacious, since the whole process could take many weeks to complete. Section 1202.1 provides an opportunity for an expedient alternative.

Southern Pacific ignores the presence of Section 1217 which provides, in full:

> "The procedure provided in this chapter shall be *alternative and cumulative and not exclusive to the right* to pursue any other procedure providing for the acquisition under eminent domain proceedings of property or interest in or to property." (Emphasis added.)

3. The Right To Enter Issued By The Commission Is Not A Final Order in Condemnation

Southern Pacific argues that the giving of the right of entry by the Commission constituted the "taking" or condemnation of its property[11] and this cannot be done without notice, hearing, and compensation.[12]

Southern Pacific engages in a display of rhetoric that does no more than confound the issues before the Court.

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[11]Jur. St. 23.

[12]Jur. St. 24.

The cases cited by Southern Pacific at pages 22-23 of its Jurisdictional Statement do not lend support or credence to its contentions. None of these cases involved a right of entry situation. None of them stand for or support the proposition that the issuance of the right to enter by the Commission constituted a final order in condemnation. The cases are simply inapposite to the issues in this case.

Southern Pacific overlooks the simple fact that the Commission declared only that the City had the right to enter its property for construction purposes; and ignores the Commission's admonition in Decision No. 92299 that the authorization to enter is not intended to convey any property right to the City, and does not eliminate the need to obtain any necessary easements or other property rights through appropriate condemnation proceedings; and ignores the fact that the Commission declared that Southern Pacific could file a petition with it for any damages sustained by the City's entry upon its right of way.[13]

Obviously, the Commission did not issue a final order in condemnation for which Sections 1206 et seq. would require the type of notice, opportunity to be heard, and just compensation envisioned therein. The procedure for final condemnation of property set forth in Section 1206 et seq. and recognized by the Commission in Decision No. 91891, as amended by Decision No. 92299, fully comport with applicable principles of constitutional law. Southern Pacific was not denied due process. The established procedures and the Commission's actions guarantee Southern Pacific due notice, an opportunity for a fair hearing, and just com-

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[13]Jur. St. Appx. E-2 and 3.

pensation prior to any final order in condemnation "taking" its property. Due process does not require anything more. As already noted, Southern Pacific's rights were also fully protected in the proceeding in Superior Court by which the City condemned the subject property pursuant to a stipulated judgment.

For all of the foregoing reasons generally, and based on the provisions of the last sentence of Section 1204 specifically, the order authorizing the City's entry on Southern Pacific's right of way was inherent in Decision No. 91469 by operation of law.

F. The Contention That The Commission Did Not Regularly Pursue Its Authority In Issuing Decision No. 91891 Is Incorrect

At pages 25 and 26 of its Jurisdictional Statement Southern Pacific asserts that the Commission in issuing Decision No. 91891 violated Sections 1736 and 1708 of the Public Utilities Code, in that it modified Decision No. 91469 without a rehearing having been held and Southern Pacific having been afforded an opportunity to be heard on the matter.

Perhaps the most glaring oversight in Southern Pacific's analysis of the Commission's action in issuing Decision No. 91891 is the fact that the decision itself adds nothing to the original decision that wasn't there in the first instance.

In Decision No. 91891, the Commission stated:

> ". . . Decision No. 91469 . . . authorized construction of the Davis Road Overhead. *Inherent* in this authorization . . . is authorization to the City to enter onto

so much of SP's right-of-way as it must to carry out the construction. . . ." (Emphasis added).[14]

The Commission also stated that the authorization to enter is:

". . . not only a necessary and logical concomitant of an order authorizing construction, but is supported by legislative enactment as well.[15]

The Commission concluded that:

"Despite our view that this authorization pursuant to Section 1204 is *inherent* in Decision No. 91469, to *avoid any confusion on this point,* we will modify that decision to *explicitly* recognize the operation of that statute." (Emphasis added).[16]

Decision No. 91891 does not substantively modify Decision No. 91469 by adding something to it or subtracting something from it. It does not enlarge or diminish any rights or obligations existing in Decision No. 91469. It merely expresses that which is implicit in Decision No. 91469. The modification effected, therefore, is one of form, not substance. As such, it is a modification that may be made pursuant to Rule 43 of the Commission's Rules of Practice and Procedure (set forth in Title 20 of the California Administrative Code).

Rule 43 provides, in part, that

"Petitions for modification . . . shall only be filed to make *minor changes* in a Commission decision or order.

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[14]Jur. St. Appx. D-2.

[15]Jur. St. Appx. D-2.

[16]Jur. St. Appx. D-3.

> *Other desired changes shall be by application for rehearing* or by a new application." (Emphasis added)

The established procedure clearly allows for minor changes to be made in a decision without first conducting a rehearing or a new original hearing, as would be required by Sections 1736 and 1708 in the case of changes that are not minor in nature. In the present case, the modification made is of language only, not substance. The change, at most, is a minor one, and a rehearing or a new original hearing is not required as a condition precedent thereto. It is interesting to note that Southern Pacific avoids any reference to Rule 43 in its petition.

In addition, Rule 87 of the Commission's Rules of Practice and Procedure supports this position by providing:

> "These rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented. In special cases and for good cause shown, the Commission may permit deviations from the rules. Rules may be amended anytime by the Commission."

Further support for this position is found in Section 1701 of the Public Utilities Code which provides:

> "All hearings, investigations, and proceedings, shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission."

Southern Pacific fails to make any attempt to differentiate between a minor modification permitted to be made in accordance with the procedure prescribed in Rule 43 and "other" modifications predicated upon the provisions of Sections 1736 and 1708. It is obvious why it has not done so.

IV

CONCLUSION

Southern Pacific fails to raise any issue not adequately decided below on state grounds or presenting a substantial federal question. Wherefore, the City respectfully submits that the instant appeal should be dismissed or, alternatively, the judgment below should be affirmed.

Dated: July 10, 1981
Salinas, California

Respectfully submitted,

DAVID M. KENNEDY
COUNSEL OF RECORD
City Attorney, City of Salinas

RAYMOND M. HAIGHT
SPECIAL COUNSEL
Attorneys for Real Party In Interest

(Appendices follow)

Appendix A

Raymond M. Haight, City Attorney
David M. Kennedy, Assistant
200 Lincoln Avenue
Salinas, CA 93901
Telephone: (408) 758-7256
Attorneys for Plaintiff

In the Superior Court of the State of California
In and For the County of Monterey

No. 76108

City of Salinas, a municipal corporation,
Plaintiff,

vs.

Southern Pacific Transportation Co., a Delaware Corporation, County of Monterey, Doe 1 to Doe 10, inclusive,
Defendants.

[Filed May 21, 1980]

ORDER FOR PREJUDGMENT POSSESSION

Based upon the declarations and other documents filed by plaintiff in support of its application for prejudgment possession, including the complaint on file in this case,

IT IS HEREBY ORDERED and DETERMINED that:

1. Plaintiff has made a deposit of the probable just compensation and filed a summary of the basis for apprais-

al opinion, both of which meet the requirement of Code of Civil Procedure, Section 1255.010, for the parcel set forth in the complaint.

2. The parcel to be acquired is described by reference to plaintiff's complaint on file herein. Plaintiff is entitled to possession of said parcel.

3. The time for service of this order may be not less than thirty (30) days prior to the time plaintiff is to take possession of said parcel.

4. The effective date of this order as to said parcel shall be January 2, 1981, or within thirty (30) days after service of the order for possession is made on the defendant-owners thereof.

5. On or after the date specified herein of service of this order, plaintiff is authorized to enter upon and take immediate possession of said parcel of land being condemned herein.

Dated: May 21, 1980.

NAT A. AGLIANO

Judge of Said Superior Court

Appendix B

David Kennedy, City Attorney
Lynch & Nave
1201 Howard Avenue, Suite 301
P.O. Box 208
Burlingame, CA 94010
Tel: (415) 348-7130
Attorneys for Plaintiff

In the Superior Court of the State of California
In and For the County of Monterey

No. 76108

City of Salinas, a municipal corporation,
Plaintiff,

vs.

Southern Pacific Transportation Company,
a Delaware corporation, et al.,
Defendants.

[Filed June 17, 1981]

STIPULATION FOR JUDGMENT AND ORDER THEREOF

IT IS STIPULATED between Plaintiff City of Salinas, a Municipal corporation, and Defendant Southern Pacific Transportation Company, a Delaware corporation, through their respective attorneys, as follows:

1. The complaint in this action was filed on May 21, 1980 to condemn the easement title to the property described in said complaint.

2. Defendant Southern Pacific Transportation Company represent that at the time of and immediately preceding the filing of the complaint, it was and now is the owner of the subject property.

3. Said Defendant has been served with summons and complaint in this action, and it is fully informed as to all matters affecting said property and expressly waives any and all other process of notice and any rights affected thereby.

4. On April 21, 1981, Chase Manhattan Bank filed a Disclaimer with the court, disclaiming any interest in and to the property being condemned herein.

5. The subject property is more particularly described in Exhibit "A" attached hereto and incorporated by reference herein.

6. That the court is authorized and petitioned to enter without further notice a judgment decreeing the easement title in and to the land, improvements, and fixtures on the subject property more particularly described in Exhibit "A," is taken and condemned as authorized by law and adjudging that the sum of One Hundred Dollars ($100.00), inclusive of interest, is full, adequate and just compensation for the taking thereof.

7. That Plaintiff City of Salinas will forthwith deposit, for said Defendants' behalf, the agreed upon just compensation, in the amount of One Hundred Dollars ($100.00), into escrow at Western Title Insurance Com-

pany, Salinas, California, together with appropriate escrow instruction, and the fee simple title in and to the subject property will forthwith vest in Plaintiff free and discharged of all claims and liens of every kind whatsoever upon recordation of the Final Judgment herein.

8. That the real property taxes, including any delinquencies, costs and interest, if any, shall be prorated (in accordance with Revenue and Taxation Code Section 4986) as of the date of the recordation of the Final Judgment, and such portion of said taxes as is attributable to the period from and after said date be, and the same are hereby cancelled, and that the lien for real property taxes, insofar as they affect the subject parcel, be cancelled, and the Auditor of the County of Monterey is directed to take whatever steps are necessary to cancel said taxes, and the lien for real property taxes, insofar as the lien for real property taxes affect the subject property, is to be cancelled and extinguished.

9. That the special assessment liens, insofar as they affect the subject property, including all delinquencies, costs, interest and principal, shall be paid off and the bonds retired and cancelled. The Auditor and/or Treasurer of the County of Monterey is directed to take whatever steps are necessary to retire and cancel said assessment bonds and to extinguish the assesssment liens.

10. Each of the parties hereto are to pay their own respective litigation costs and attorneys' fees.

Dated:

DAVID KENNEDY,
CITY ATTORNEY
LYNCH & NAVE

/s/ Michael R. Nave

Michael R. Nave
Attorneys for Plaintiff

HOGE, FENTON, JONES
& APPEL, INC.

Dated: June 10, 1981

/s/ Lewis L. Fenton

Lewis L. Fenton
Attorneys for Defendant
SOUTHERN PACIFIC
TRANSPORTATION
COMPANY

ORDER ON STIPULATION AND JUDGMENT

IT IS ORDERED this 17th day of June, 1981.

RALPH M. DRUMMOND

Judge of the Superior Court

EXHIBIT A

DESCRIPTION OF EASEMENT TO BE ACQUIRED

A perpetual easement for construction and maintenance of an overcrossing for vehicular traffic over and across the real property situate in the City of Salinas, Monterey County, California described as follows:

Being a portion of that certain parcel of land conveyed to the Southern Pacific Transportation Company being more particularly described as follows; to wit:

Beginning at a point in the southerly boundary of that above-described parcel of land, said point being the northwest corner of that certain parcel of land conveyed to the Pacific Gas and Electric Company, a California Corporation by deed recorded July 23, 1956 in volume 1723 at page 395 therein Official Records of Monterey County, California thence along said southerly boundary

(1) N.64°46′00″W. 290.00 feet to a point; thence departing from said southerly boundary

(2) N.25°14′00″E. 18.00 feet to a point; thence

(3) S.64°46′00″E. 80.00 feet to a point; thence

(4) N.29°02′31″E. 132.37 feet to a point in the northerly boundary of said parcel of land; thence along said northerly boundary

(5) S.64°46′00″E. 120.68 feet to a point; thence departing from said northerly boundary

(6) S.25°00′14″W. 132.08 feet to a point; thence

(7) S.64°46'00"E. 80.00 feet to a point; thence

(8) S.25°14'00"W. 18.00 feet to the place of beginning. Containing 0.500 acre of land more or less. (21774.67 s.f.)

[Seal]

Appendix C

David Kennedy, City Attorney
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P.O. Box 208
Burlingame, CA 94010
Tel: (415) 348-7130
Attorney for Plaintiff

In the Superior Court of the State of California
In and For the County of Monterey

No. 76108

City of Salinas, a municipal corporation,
Plaintiff,

vs.

Southern Pacific Transportation Company,
a Delaware corporation, et al.,
Defendants.

[Filed June 17, 1981]

FINAL JUDGMENT OF CONDEMNATION

It appearing to the court that Plaintiff, in accordance with the Stipulation for Judgment between the parties, is to forthwith deposit for the Defendant's benefit the sum of One Hundred Dollars ($100.00).

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the easement title in and to the land.

improvements, and fixtures on the subject properties for park purposes will vest in Plaintiff free and discharged of all claims and liens of every kind whatsoever forthwith upon recordation of this Final Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

(a) The public interest and necessity require the project;

(b) The acquisition is planned and located in the manner that will be most compatible with the greatest public good and to the least private injury; and

(c) The property sought to be acquired is necessary for the purpose of a railroad crossing for vehicular and non-vehicular traffic and appurtenances hereto.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the real property taxes, including any delinquencies, costs and interest, if any, shall be prorated (in accordance with Revenue and Taxation Code Section 4986) as of the date of the recordation, of this Final Judgment, and such portion of said taxes as is attributable to the period from and after said date be, and the same is hereby cancelled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any special assessment liens shall be extinguished and the assessment bonds cancelled as of the date of the recordation of this Final Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the subject property is situate in the County of Monterey, State of California, and more particularly

described in Exhibit "A" attached hereto and by this reference made a part hereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of Plaintiff and against Defendant herein on the complaint.

DONE IN OPEN COURT this 17th day of June, 1981.

RALPH M. DRUMMOND

Judge of the Superior Court

EXHIBIT A

DESCRIPTION OF EASEMENT TO BE ACQUIRED

A perpetual easement for construction and maintenance of an overcrossing for vehicular traffic over and across the real property situate in the City of Salinas, Monterey County, California described as follows:

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[Seal]